

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554**

In the Matter of)	WC Docket No. 12-23
)	
PETITION FOR WAIVER)	WC Docket No. 11-42
)	
OF)	WC Docket No. 03-109
)	
UTPHONE, INC.)	CC Docket No. 96-45

REPLY COMMENTS OF UTPHONE, INC.

UTPhone, Inc. (“UTPhone”), by its attorneys and pursuant to the Wireline Competition Bureau’s *Public Notice* in this matter (DA 12-1285, rel. Aug. 8, 2012), hereby submits these Reply Comments on its Petition for Waiver of Sections 54.413(a) and 54.414(a) of the Commission’s rules (47 C.F.R. §§ 54.413(a), 54.414(a)).¹

I. BACKGROUND

UTPhone is a small wireline competitive Eligible Telecommunications Carrier (ETC) that serves predominantly low income wireline Lifeline subscribers on Tribal lands in Oklahoma.² Recently, it has begun providing its Lifeline voice service to customers over its new, facilities-based broadband network. In its Petition, UTPhone seeks a limited waiver of the phrase in the Commission’s recently revised Tribal Link Up rules that restricts Tribal Link Up support to ETCs that “*are receiving* high cost support on Tribal lands.”³ Such a waiver is needed

¹ Petition for Waiver of UTPhone, Inc. in WC Dkt. Nos. 11-42 *et al.* (filed June 21, 2012) (“Petition”). *See also* Letter from James M. Smith, counsel to UTPhone, to Marlene H. Dortch, Secretary, FCC, WC Dkt. 11-42 *et al.* (filed July 18, 2012) (“Supplement to Petition”).

² *See* Okla. Corp. Comm. Order No. 527973, Cause No. PUD 200600090 (granted Aug. 2, 2006).

³ 47 C.F.R. §§54.413(a), 54.414(a) (2012) (emphasis added). *See Lifeline and Link Up Reform and Modernization, Report and Order and Further Notice of Proposed Rulemaking*, WC Docket Nos. 11-42 *et al.*, FCC 12-11 (rel. Feb. 6, 2012) (“*Lifeline Reform Order*”). UTPhone’s request is limited both in the sense that it seeks waiver only of the nomenclature that an ETC must be *currently receiving* high cost support—for that is an impossibility for newly

in light of another recently revised rule that effectively prevents UTPhone, a newly facilities-based ETC, from “receiving” such support even though (1) it would be eligible to receive such support if it had been facilities-based on December 31, 2011,⁴ and (2) all the other similarly situated facilities-based carriers in its Tribal lands service area, *including* several competitive ETCs (“CETCs”), continue to receive Tribal Link Up support.⁵ The net effect of the interplay of these new rules is that UTPhone and its low income customers—and only UTPhone and its customers—are deemed ineligible for the same Tribal Link Up support to defray the extremely expensive connection costs in these remote lands that are being received by all other facilities-based carriers and their customers in the same areas. Moreover, an even more perverse impact of the interplay of these rules—absent the requested waiver in this unique circumstance-- is that low income consumers in these remote Tribal lands might be denied access to a new, advanced, high-speed broadband network that is otherwise unavailable to these consumers,⁶ in flagrant derogation of the Commission’s paramount objective to expand broadband adoption by consumers in these challenging areas and populations.

II. UTPHONE’S WAIVER REQUEST IS UNOPPOSED

Notably, no comments were filed in opposition to UTPhone’s waiver request in response to the Bureau’s *Public Notice*.⁷ Equally telling, no party challenged or disagreed with UTPhone’s showings that it is being uniquely and differentially disadvantaged by the

facilities-based CETCs under revised section 54.307 of the rules, *see* discussion *infra*; and in the sense that it seeks eligibility for Tribal Link Up support only insofar as such support remains available to other similarly situated carriers, a subject that is currently under review in the pending *Further Notice of Proposed Rulemaking* in the Lifeline Reform proceeding. *See Lifeline Reform Order* at ¶ 482.

⁴ *See* 47 C.F.R. § 54.307(e)(1) (2012).

⁵ *See* Supplement to Petition at 2-3.

⁶ It is worthy of note that UTPhone is an applicant in the Commission’s Broadband Adoption Lifeline Pilot Program. *See* Application of UTPhone, Inc. in WC Docket No. 11-42, filed July 2, 2012.

⁷ Comments on the *Public Notice* were due on September 7, 2012.

withholding of Tribal Link Up support. In brief, as further described in UTPhone's Petition and Supplement, these unique circumstances are: (1) UTPhone would be eligible for Tribal Link Up support if only it had become a facilities-based ETC a few months earlier than it did (in early 2012), *i.e.*, by December 31, 2011; (2) all of its competitors in its Oklahoma Tribal lands service area— ILECs, facilities-based CETCs and UNE-based ETCs alike—are continuing to receive Tribal Link Up support, putting UTPhone at a crippling competitive disadvantage and depriving low income consumers of an attractive competitive choice; and (3) absent grant of this waiver, the residents of these remote lands could be deprived of new, advanced high speed broadband service that in many locations is not available from any other provider. The lack of any opposition by any party militates strongly in favor of grant of this limited waiver.

III. UTPHONE IS DESERVING OF A WAIVER IN THIS UNIQUE CIRCUMSTANCE, TO AVOID COMPETITIVE INEQUITY AND HARM TO LIFELINE SERVICE AND BROADBAND ADOPTION ON OKLAHOMA TRIBAL LANDS

UTPhone demonstrably is not seeking to exploit the Tribal Link Up program to subsidize general operations rather than to support actual connection costs, which behavior the Commission cited in the *Lifeline Reform Order* in deciding to end Link Up in non-Tribal areas and for non-facilities based carriers in Tribal lands.⁸ To the contrary, it is doing the opposite: it has in good faith expended its own capital to build its own advanced broadband network on Tribal lands that heretofore have been unserved or underserved by broadband— a paramount Commission goal in its Tribal Lifeline Orders,⁹ its National Broadband Plan,¹⁰ its Connect

⁸ *Lifeline Reform Order* at ¶¶ 248-251 and n.689.

⁹ See *Twelfth Report and Order* in CC Docket No. 96-45, 15 FCC Rcd 12208, 12239-40, ¶ 60 (2000) (“*Tribal Lifeline Order*”). As the recent *Lifeline Reform Order* explained, “[w]hen the Commission first established the expanded Link Up program for Tribal lands, it observed that doing so would create incentives for carriers to construct facilities where none existed.” *Lifeline Reform Order* at n. 655. This is exactly what UTPhone has done in 2012 and continues to do in constructing and expanding its facilities infrastructure. See Supplement to Petition at 1-2.

America Fund initiative,¹¹ and indeed in the *Lifeline Reform Order* that altered the rules here at issue.¹² Further, UTPhone has applied to the Oklahoma Corporation Commission to remove prior limitations in its ETC designation in light of its long-term commitment to build, maintain and expand its network and, prospectively, to seek to participate in the Connect America Fund.¹³ Such designation essentially would confirm that even though UTPhone is precluded from “receiving high cost support” under section 54.307 of the rules, it would otherwise be eligible as as a high cost ETC under sections 54.201 and 54.202 of the rules.

Moreover, and importantly, to the extent that the Bureau might perceive that grant of this limited waiver under these unique circumstances might undermine a Commission policy favoring limitation of Tribal Link Up support to one ETC in a given service area, any such consideration simply does not apply to the instant situation, where *multiple* facilities-based ETCs are currently receiving Tribal Link Up support in UTPhone’s service area even under the Commission’s revised rules—indeed, all such ETCs except UTPhone.¹⁴ That, indeed, is a crux of this Petition: that UTPhone and its customers should not be denied the same Link Up support that continues to be received by all the other similarly situated ETCs, both ILEC and CLEC, with

¹⁰ Federal Communications Commission, *Connecting America: The National Broadband Plan*, rel. Mar. 16, 2010, especially at pp. 152-153, 172-173.

¹¹ *Connect America Fund et al.*, WC Docket Nos. 10-90 *et al.*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, ¶¶ 479-482 (2011) (“*Connect America Fund Order*”).

¹² *Lifeline Reform Order* at ¶¶ 149, 321, 350. Indeed, the *Lifeline Reform Order* is designed, among other things, to “advance the availability of Lifeline and Link Up support for low income consumers living on or near Tribal lands.” *Id.* at ¶ 60 (emphasis added). See also *id.* at ¶¶ 149, 480. Accordingly, while the Commission found that Link Up support generally should be ended, it decided that “given the significant telecommunications deployment and access challenges on Tribal lands . . . at the present time we will maintain enhanced Link Up support for those ETCs that also receive high-cost support on Tribal lands.” *Id.* at ¶ 245. See also *Connect America Fund Order*, *supra*, at ¶¶ 479-482. The Commission decided to limit Tribal Link Up only to ETCs “that also receive high-cost support on Tribal lands” on the rationale that “[c]onsistent with the intent of the enhanced Link Up program, those ETCs are building telecommunications infrastructure on Tribal lands, which have significant telecommunications deployment and connectivity challenges.” *Id.* at ¶ 254 & nn. 687, 690. UTPhone has done exactly that, even though it cannot receive legacy high cost fund support.

¹³ Application of UTPhone, Inc. in Cause No. PUD 201200213 (Okla. Corp. Comm., filed Sept. 20, 2012).

¹⁴ See Supplement to Petition at 2-3 and citations therein.

which UTPhone competes in its Tribal service area.¹⁵ Such denial obviously would be devastating to UTPhone's competitive viability, and certainly to its plans to further build out its broadband network.

Relatedly, and bluntly stated, denial of this waiver would retard broadband infrastructure deployment and adoption on these Tribal lands, in large swaths of which there is currently no such infrastructure and in other areas there is only limited and antiquated infrastructure. It is accurate to state that in many parts of UTPhone's service area, it is the only carrier that is building new, advanced infrastructure. In short, denial of this waiver would, in these areas, mindlessly defeat the Commission's overarching objectives for broadband expansion to and adoption by particularly remote and needful low-income consumers, based on nothing more than a rigid application of rules that are intended by the Commission to have precisely the opposite effect.¹⁶

¹⁵ Again, UTPhone acknowledges that such support may not be available indefinitely, depending upon the outcomes of the Lifeline Reform *Further Notice* and future Connect America Fund proceedings.

¹⁶ Particularly noteworthy are recent remarks of Commissioner Pai at a Rural Broadband Roundtable in Oswego, Kansas: "If we want to revitalize rural America, encouraging rural broadband deployment needs to be a top priority. Broadband access to the Internet can address many of the reasons that people leave for metropolitan areas. A broadband connection can enable a small businesswoman in Oswego to market her products to a nationwide audience, not just to people in Labette County. High-speed Internet access can make available more educational options for rural students and those seeking job training. And strong broadband infrastructure can supply better access to medical care, via telemedicine, to citizens of all ages. In short, broadband can bring to the country many of the opportunities often taken for granted in the city. . . . [W]e need a regulatory environment that encourages the private sector to invest in and upgrade rural broadband networks." Opening Remarks of Commissioner Ajit Pai at Rural Broadband Roundtable, Oswego, Kansas, Sept. 6, 2012. In this instance, UTPhone has invested its own private capital in a new rural broadband facilities network, yet the regulations at issue would deny UTPhone the same support that is enjoyed by all of its competitors *without* any comparable new facilities investment.

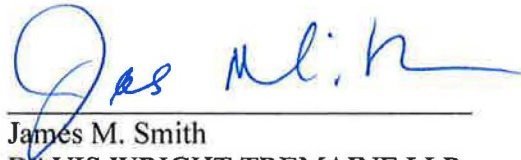
IV. CONCLUSION

In light of the foregoing and the showings in UTPhone's Petition for Waiver and Supplement, and in the absence of any opposition, UTPhone respectfully requests that the Bureau grant the instant Petition for Waiver as expeditiously as possible.

Respectfully submitted,

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